EXHIBIT A

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FIFTH JUDICIAL CIRCUIT**
COUNTY OF RICHLAND	)	

Richard A. Harpootlian,

Plaintiff,

v.

South Carolina Department of Commerce; Secretary Robert Hitt in his official capacity; Coordinating Council for Economic Development; and Director Daniel Young in his official capacity,

Defendants,

C/A No. 2019-CP-40-05675

ORDER

This is a dispute under the South Carolina Freedom of Information Act (FOIA), S.C. Code Ann. §§ 30-4-10 *et seq.*, that is before the Court on cross motions for summary judgment by Plaintiff Richard A. Harpootlian and Defendants South Carolina Department of Commerce (Commerce); Secretary Robert Hitt, sued in his official capacity; Coordinating Council for Economic Development (Council); and Director Daniel Young, sued in his official capacity.

After two private corporations that received public subsidies were featured in news reports, Plaintiff served a public records request on Defendants and then filed this action on October 8, 2019, seeking declaratory and injunctive relief in the form of a disclosure order overruling FOIA exemptions invoked by Defendants. Specifically, Plaintiff alleges Defendants withheld and redacted certain categories of information concerning the two projects under the privacy exemption codified at South Carolina Code § 30-4-40(a)(2), the pending contract and confidential proprietary information exemption set forth at § 30-4-40(a)(5)(c), and the work papers exemption at § 30-4-40(a)(9), and asks the Court to declare those withholdings violative of the FOIA.

On October 30, 2019, the Court held a preliminary hearing, as required by South Carolina Code § 30-4-100(A). The parties subsequently conducted discovery and filed motions for summary judgment. On June 10, 2020, the Court heard argument on the motions and took the matter under advisement. Thereafter, the Court asked Defendants to make an *in camera* production of materials withheld under the disputed FOIA exemptions. On September 1, 2020, the Court convened another hearing to question Defendants about the production. The Court has had the opportunity to consider the briefs and arguments of the parties and review Defendants' *in camera* production such that this matter is ripe for a decision. Both motions are **GRANTED IN PART AND DENIED IN PART** and the Court makes the following findings of fact and conclusions of law.

I. FINDINGS OF FACT

The FOIA requests at issues here were served on August 23, 2019 and requested public records concerning economic incentive deals with two private companies: Viva Recycling of South Carolina, LLC (Viva) and Giti Tire Company (Giti). Prior to the requests being served, public news reports both touted the expected benefits of the projects and scrutinized the benefit.[1] It is undisputed that the purpose of these public-private economic projects, and others like them, is to attract capital investment and spur job creation for the benefit of the State of South Carolina and its citizens. Whether that has or has not happened with the Giti or Viva projects, or on any other particular occasion, is not a matter before the Court. Nevertheless, Plaintiff argues that disclosure of the information withheld by Defendants is necessary for the public to evaluate the benefit of the bargain and hold public officials accountable for these state-funded programs. *See*,

[1] *See, e.g.*, AP staff report, "Giti Tire joins 4 others to make South Carolina the tire king in U.S.," THE POST AND COURIER (P&C) (Oct. 4, 2017); Tony Bartelme and David Wren, "Lax rules left mountains of mosquito-infested, flammable tires in South Carolina," P&C (Apr. 22, 2018); Andrew Brown, "SC tire manufacturer didn't pay contractor because of 'cash flow' problems," P&C (Aug. 19, 2019).

e.g., Pl.'s MSJ, 20 ("[T]his case asks whether the public has the ability to evaluate the benefit of a bargain struck by Commerce and hold elected leaders accountable for how public money is being spent.").

For its part, Commerce maintains the exemptions relied upon fall squarely within the FOIA, reflect the longstanding practice of the department, and that disclosure is not necessary to advance the accountability interests Plaintiff cites as the need for disclosure. *See, e.g.*, Defs' MSJ, 5–18. The Court turns first to the particulars of the FOIA requests at issue before considering specific evidentiary contentions offered by the parties, and Commerce's historical practice.

A. The FOIA requests, responses, and withholdings.

By way of background, the Giti project concerns the construction of a facility in Chester County (beginning September 2014, to be completed October 2016) subsidized by a fee-in-lieu-of-taxes agreement with the county (i.e., replacing millage taxation), job tax credits, job development credits, special source revenue bond/credit, a utility grant/loan, a $35 million grant, and a $4.6 million project from the Rural Infrastructure Authority (RIA). *See* Prelim. Hr'g Tr. 32–35; *see also* Cmpl. at Ex. E, pp. DOC_Giti_Tire_FOIA_000002–06.[2] There is no dispute that the $35 million grant from the Coordinating Council and $4.6 million in RIA funds are public funds "provided by the General Assembly in one form or fashion[.]" Prelim. Hr.'g Tr. 35. The Viva project, on the other hand, never went forward as planned. *See* Manning Dep. 54.

Plaintiff's public records requests seek similar disclosures from Defendants. As to the Giti project, Plaintiff sought all correspondence, cost-benefit analysis of the deal, state and local grant agreements, and documents relating to any incentive, revitalization agreements, or job

[2] Hereafter, citations to the FOIA response attached to the Complaint as Exhibit E will simply refer to the Bates number.

development credit (JDC) agreements. *See* Cmplt. ¶ 17. As to the Viva project, the request seeks all correspondence, cost-benefit analysis, state and local incentives or grants, incentive or revitalization or JDC, and loans or bonds issued to Viva or others related to the project. *See id.* ¶ 18. Generally, the public records produced in response to these requests are attached to the Complaint[3] and the redactions contained therein conceal categories of information disputed in this case. The categories of items withheld in their entirety are identified on Defendants' privilege log, which details correspondence, reports, and other documents concerning the Giti and Viva projects. *See* Pl.'s MSJ at Ex. C. The Court has had an opportunity to review examples of both the redacted and withheld documents *in camera*.

B. Plaintiff's challenge to Defendants asserted exemptions.

Plaintiff challenges three aspects of Defendants' withholdings. First, Plaintiff argues the records provided in response to the FOIA requests are redacted in a manner that improperly conceals basic information from public view, information like the names of corporate officers and attorneys responsible for securing state assistance for these private companies and their communications with state officials. *See* Pl.'s MSJ, 22–23. Second, Plaintiff observes that certain deal information, like the cost of land, construction, acquisition, and machinery and payroll estimates, are redacted such that it is impossible to evaluate the basis for Commerce's assumptions about the projects' total economic impact on the State. *See* Pl.'s MSJ, 2, 4–5, 28–29. Plaintiff also points to redactions that obscure the total estimated public costs and benefits under these projects, pointing specifically to sources of funding like federal funding, which are redacted to prevent the

[3] By letters dated October 9, Commerce furnished 48 additional pages of materials concerning Viva. On October 11, Commerce furnished three additional pages of materials concerning Giti that were inadvertently omitted from the initial production. These responses have been filed with the clerk in conjunction with another case filing.

public from mathematically discerning the monetary value of other withheld information. *See id.* Finally, Plaintiff argues there is "almost no public information" made available about tax credits—typically granted in the form of payroll tax credits—intended to incentivize hiring and reward job creation. *See* Pl.'s MSJ, 13. All of this information, Plaintiff contends, falls outside any valid FOIA exemption and is necessary to evaluate the benefit of the bargain struck by Commerce and to hold elected leaders accountable for its performance.

In support of its position, Plaintiff offered the testimony of Dr. Rebecca Gunglaugsson during the preliminary hearing in this case. Dr. Gunglaugsson is an economist, former director of research at the South Carolina Department of Commerce, and an expert in the field of economic incentive packages. Prelim. Hr'g Tr. 76–78. She offered two observations about the FOIA responses here. First, concerning the Giti deal, she opined that "it vastly overstates the economic impact" of the Giti project to the State, but that "it is not possible for [her] to completely replicate that because a number of elements are redacted from the study." *Id.* at 78 ("I do not have the underlying calculations or inputs or suppositions for the model."). Second, Dr. Gunglaugsson observes the FOIA response is "missing a tremendous number of statutorily or agreement required follow up documents which would allow you to go back and look at the economic impact analysis and evaluate it after the fact to verify that it was accurate in the first place." *Id.* at 79; *see also id.* at 82–83 (describing public records required for this analysis). Thus, Plaintiff argues Dr. Gunglaugsson's testimony demonstrates it is not possible for the public to evaluate the benefit of the bargain struck by Commerce, even when the person in question is familiar with Commerce and has Dr. Gunglaugsson's expertise. *See* Pl.'s MSJ, 18. Dr. Gunglaugsson is the only expert to offer an opinion in this case.

With respect to the Giti project, the application promises 1,700 new jobs and a $560 million capital investment. Plaintiff, however, points to redacted records that conceal the average estimated wage for the promised jobs and the breakout of the anticipated capital investment as examples of impermissible redaction that frustrate the public's ability to evaluate the Giti project. *See* Pl.'s MSJ, 5 (citing DOC_Giti_Tire_FOIA_000003–04). In addition, Plaintiff identifies numerous entries on Defendants' privilege log where email communications, performance agreements, grant awards agreements, memoranda of understanding, and other deal records are all withheld under claim of the personal privacy or confidentiality proprietary exemptions. *See* Pl.'s MSJ, 25–26. With the exception of taxpayer information and the number of tires produced per day (two items Plaintiff does not challenge as subject to disclosure), it is unclear why these items should be exempt. Instead, Commerce takes a very broad view, maintaining information like land cost, JDCs, and progress reports are all "proprietary" and thus exempt. *See* Prelim. Hr'g Tr. 61–64, 66 & 69. Applying this expansive view causes Commerce not only to redact data inputs, but also top-line reports concerning the costs and benefits of the Giti project. *See* DOC_Giti_Tire_000035.

Other aspects of the Giti project and what Commerce considered in furtherance of it remain undisclosed. For example, while Secretary Hitt acknowledged the existence of monitoring or status reports, they were not furnished in response to the FOIA requests and appear to be part of the department's withheld records. *See* Prelim. Hr'g. Tr. 42–44 ("There are a lot of requirements in the performance packages agreement whether companies have to report back to us on a periodic basis specified in each agreement."). Likewise, Commerce has statutory performance certifications required by South Carolina Code § 12-10-80 reflecting that an applicant has met minimum employment and capital investment levels prior to receiving tax credits from the State. *See* Prelim.

Hr'g Tr. 71–73 ("If the statute requires it, then I would say we probably have it."). Finally, while Secretary Hitt acknowledged there was likely "a lot of communication" concerning a project like the Giti project (*see* Prelim. Hr'g Tr. 53), only a small number of redacted communications were furnished to Plaintiff. *See, e.g.*, DOC_Giti_Tire_FOIA 000062 ("Just talked to [redacted] He says they are financially sound and committed to Chester.").

C. Defendants' practices here comport with Commerce's longstanding practice in response to public record requests.

The Court finds that Commerce's redactions and withholdings here are consistent with its longstanding practices when answering FOIA requests. This conclusion is demonstrated by the testimony of Commerce personnel and its written responses to discovery.

Generally, Commerce negotiates prospective economic incentive deals, which are reviewed by a subcommittee called the enterprise zone committee followed by the Coordinating Council, which Secretary Hitt chairs. *See* Prelim. Hr'g Tr. 36–39. The Coordinating Council is a statutory entity within Commerce made up of eleven agency heads with authority over two types of discretionary incentives: (1) grants from the Set-Aside Fund, Closing Fund, or Rural Infrastructure Fund (RIF) and (2) Job Development Credits (JDCs). *See* Manning Dep. at 10–12. During Secretary Hitt's nine-year tenure as head of Commerce, he has done approximately 1,200 economic incentive deals. Prelim. Hr'g Tr. 25 & 28. He explained projects come to the agency directly from existing companies looking to expand or "blind" from a "site selection firm contact" looking at South Carolina as one of many potential location placement sites. *Id.* at 26–27. Secretary Hitt did not, himself, review Defendants' FOIA response, but generally he expressed agreement with the redactions and withholdings made by his department. *See id.* at 48–49 & 55–56. As to company executives and lawyers, he testified that "people who represent companies are not the company itself, and so we think they have a right of privacy." *Id.* at 56. By Secretary Hitt's

description, maintaining the privacy of these individuals has been the "custom in the agency for some time." *Id.* at 60–61.

Commerce staff and written discovery confirm the same. The primary Commerce staffer responsible for handling FOIA responses is chief legal counsel Karen Manning, Esq., a 22-year veteran of the department. Pl.'s MSJ at Ex. D; Defs' Interrog. Resp. No. 1 & Ex. E; Manning Dep. 6–7. In answering FOIAs, Ms. Manning communicates with companies regarding proposed redactions and what exemptions Commerce will assert. *See* Defs' Interrog. Resp. No. 1. For instance, when answering the requests here, Director Young notified Giti via email that Commerce received the FOIA request and Ms. Manning communicated with Giti corporate counsel via phone and email concerning possible redactions. Defs' Interrog. Resp. No. 3. While Commerce had no direct communications with Viva about the FOIA, Ms. Manning asked its former lawyer whether his name and firm name should be redacted. *See* Defs' Interrog. Resp. No. 4. However, as to the FOIA directed at the Viva project, Commerce did not redact communications to conceal the identity of the company's former lawyer because Viva "is no longer located in South Carolina[.]" *Id.* As Defendants' written discovery responses explain, they view employee names and contact information as information that would constitute an unreasonable invasion of personal privacy if disclosed while serving no "legitimate" public purpose. *See* Defs' Interrog. Resp. No. 8. Nevertheless, Defendants explain such determinations are made on a "case-by-case" basis, *id.*, with Viva being an example of Defendants choosing not to assert an exemption to withhold the name of the lawyer that previously represented the company. As for economic metrics that outline the purported benefit of a deal—information including an investment breakdown and average salaries or wages—Commerce identified this as the type of information it believes is exempt as confidential proprietary information. *See* Defs' Interrog. Resp. No. 11.

A Commerce bulletin also confirms the department's broad view of FOIA exemptions to require "limited disclosure" when it comes to its economic development work with prospect companies. *See* Manning Dep. 35. The bulletin, which refers to prospect companies as Commerce's "clients", discusses Commerce's "dual obligation[ ] of public accountability and protection of private details that are not needed to reveal public costs[.]" *Id.* at 15–16 (quoting Commerce_000032). Notably, this guidance does not contemplate the need to reveal public *benefits*. Finally, after reviewing the scope of information Commerce deems "valuable to a company's competitors (e.g., average or individual wages, investment breakdowns, health plans, financial information, production volumes, et cetera)[,]" Ms. Manning was unsure what categories of information remained subject to public disclosure. *See id.* at 44. Finally, Commerce routinely enters into nondisclosure agreements (NDAs) with prospect companies that require it to invoke FOIA exemptions "to the maximum extent allowed by law" and to notify companies when the department receives requests for company-related information. Defs' Interrog. Resp. No. 4. Nevertheless, in Commerce's view, these NDAs are unnecessary because the FOIA exemptions are coextensive with information subject to the NDAs. *See* Manning Dep. 17–18.

The Court finds that the exemptions asserted by Defendants here are consistent with what appears to be the longtime and documented practice of the department. Whether these practices comport with the FOIA is another question.

II. STANDARD OF REVIEW

"Where an action is filed for declaratory judgment seeking affirmative relief, the movant must prove his material allegations by a preponderance of the evidence." *Vermont Mut. Ins. Co. v. Singleton*, 316 S.C. 5, 10, 446 S.E.2d 417, 421 (1994). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, admissions, and affidavits show that there

is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. However, the FOIA is a remedial statute, liberally construed to carry out its purpose—protecting the public from government secrecy. *Glassmeyer v. City of Columbia*, 414 S.C. 213, 219, 777 S.E.2d 835, 839 (Ct. App. 2015) (citing *Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 161, 547 S.E.2d 862, 864–65 (2001)). "Whether a record is exempt from disclosure depends on the particular facts of the case." *Id.* (citing *City of Columbia v. ACLU*, 323 S.C. 384, 387, 475 S.E.2d 747, 749 (1996)). "Underlying each case, however, is the principle the exemptions in section 30–4–40 of the South Carolina Code (2007) are to be narrowly construed so as to fulfill the purpose of the FOIA." *Id.* (citing *Evening Post Publ'g. Co. v. City of N. Charleston*, 363 S.C. 452, 457, 611 S.E.2d 496, 499 (2005)). "To further advance this purpose, the government has the burden of proving an exemption applies." *Id.*

III. CONCLUSIONS OF LAW

This case asks the Court to define the limits of FOIA exemptions that conceal aspects of economic incentive deals between the State and private companies. The categories of information at issue would reveal the identity of company executives and lawyers responsible for negotiating public incentives, some of their communications with public officials and employees, and data that would allow the public to evaluate the benefit of the bargain received by South Carolina taxpayers.

In considering this matter, the Court begins with the "essential purpose" of the FOIA "to protect the public from secret government activity." *Glassmeyer*, 414 S.C. at 219, 777 S.E.2d at 839. Our legislature has deemed it "vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and of the decisions that are reached in public activity and in the formulation of public policy." S.C. Code Ann. § 30-4-15. To that end, the FOIA "must be construed so as to make it possible for

citizens, or their representatives, to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings." *Id.*

In *Weston v. Carolina Research & Development Foundation*, 303 S.C. 398, 401 S.E.2d 161 (1991), our Supreme Court held a foundation subject to the FOIA by distinguishing between arms-length commercial transactions where goods or services of value are exchanged for public money and the block-grant diversion of public money, explaining:

> [W]hen a block of public funds is diverted *en masse* from a public body to a related organization, or when the related organization undertakes the management of the expenditure of public funds, the only way that the public can determine with specificity how those funds were spent is through access to the records and affairs of the organization receiving and spending the funds.

Id. at 404, 401 S.E.2d at 165. The Court does not find, and Plaintiff does not contend, that *no* FOIA exemptions can properly be invoked here. Instead, Plaintiff argues Defendants' reliance on certain exemptions conceals far too much otherwise public information that is otherwise necessary for the public to understand what its government is doing. While the Court does not dispute Commerce's contention that companies "are very private" and, under normal circumstances, "do not have to reveal this information to the public" (*see* Prelim. Hr'g Tr. 65), the question here is whether the public is entitled to disclosure of certain public information once these companies voluntarily seek and obtain public assistance. The economic incentive deals at issue here concern huge sums of block-grant funding, tax credits, and other public expenditures to the tune of tens of millions of public dollars. As stated above, the wisdom and efficacy of these deals is not a matter the Court can resolve, and the Court makes no judgment about them. However, when, as is the case here, a member of the public seeks public records to make his own determination about the activity of his government, that effort falls squarely within the purpose of the FOIA and those incentive agreements implicate *Weston* such that those concerns are very much present here.

Plaintiff's Complaint challenges Defendants' reliance on FOIA exemptions codified at South Carolina Code §§ 30-4-40(a)(1), (2), (5), and (9). Certain issues are not or are no longer in dispute. The Court turns to those items first.

As indicated in his papers and during hearings, Plaintiff does not challenge Defendants' reliance on South Carolina Code § 12-54-240 to withhold certain taxpayer information. *See*, *e.g.*, Pl.'s MSJ, 20 n.5. Thus, that taxpayer protected information is not at issue. Additionally, Defendants argue Secretary Hitt and Director Young are not "public bodies" within the meaning of the FOIA. Defs' Mem. MSJ, 4–5. During the June 10 hearing, Plaintiff agreed and consented to Secretary Hitt and Director Young's dismissal. Accordingly, Defendants' motion is **GRANTED** as to Secretary Hitt and Director Young. Finally, Defendants represent that the only document withheld under the "trade secret" exemption codified as South Carolina Code § 30-4-40(a)(1) is a copy of the plant layout for a Giti manufacturing facility. *See* Defs' MSJ Mem., 6. Based on that representation, Plaintiff agrees the plant layout is potentially a trade secret within the meaning of the FOIA and withdraws his challenge to that item.

With these preliminary items resolved, the Court turns to the remaining aspects of this dispute and whether Defendants have carried their burden to show an exemption applies.

A. Defendants' personal, privacy exemption under § 30-4-40(a)(2) are overruled.

The FOIA allows a public body to withhold "[i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy, including, but not limited to, information as to gross receipts contained in applications for business licenses." S.C. Code Ann. § 30-4-40(a)(2). Defendants contend the identity of corporate officers and lawyers involved in obtaining economic incentive agreements need not be disclosed because doing so violates the personal, privacy exemption of the FOIA. The Court disagrees and holds that the

identity of corporate executives and lawyers involved in economic incentive deals with the State is not personal or private within the meaning of the FOIA.

In *Burton v. York County Sheriff's Dept.*, 358 S.C. 339, 594 S.E.2d 888 (Ct. App. 2004), the court of appeals observed that § 30-4-40(a)(2) does not specifically define the type of information contemplated by the exemption, therefore it must "resort to general privacy principles, which examination involves a balancing of conflicting interests—the interest of the individual in privacy on the one hand against the interest of the public's need to know on the other." *Id.* at 352, 594 S.E.2d at 895. Applying that standard, the court reasoned the right to privacy does not prohibit the publication of matter of legitimate public or general interest; to the contrary, "if a person, whether willingly or not, becomes an actor in an event of public or general interest, 'then the publication of his connection with such an occurrence is not an invasion of his right to privacy.'" *Id.* at 352, 594 S.E.2d at 895 (quoting *Doe v. Berkeley Publishers*, 329 S.C. 412, 414, 496 S.E.2d 636, 637 (1998)). In that case, the operation of the sheriff's department was a "large and vital public interest" that far outweighed the desire to remain out of the public eye. *Id.* While the information at issue here is more complicated, the rule in *Burton* nevertheless controls.

Commerce concedes a corporation lacks any expectation of privacy (*see* Defs' Interrog. Resp. No. 10), thus the question here is whether disclosing the identity of corporate officers and lawyers impermissibly invades those individuals' right to privacy. Having reviewed the records in this case, the Court holds it does not. The individuals whose identities are at issue, whether willingly or not, have become actors in a matter of public interest by virtue of their efforts to obtain economic incentives from the State for their respective companies and clients. There is nothing inherently invasive about disclosing their involvement and the Court is persuaded that need for disclosure of their identity is in the public interest and outweighs any one individuals' interest in

remaining outside public view. Moreover, like the sheriff deputies in *Burton*, these individuals knew or should have known that doing business with the State might include some public scrutiny of that relationship. Where the State is providing millions of dollars in public incentives to private companies, the Court finds no evidence and only conjecture that the modest disclosure sought by Plaintiff imposes any real burden on the individuals involved or that it would chill participation in Commerce's economic incentive deals.

Defendants maintained such disclosures are an unreasonable invasion of privacy absent "any legitimate public purpose" (*see* Defs' Interrog. Resp. No. 8; *see also* Manning Dep. 45–46), but this view is incompatible with the record. For instance, Ms. Manning testified that one of the ways Plaintiff could obtain information about a prospect company's executives is to "go to the company's website." *See* Manning Dep. 48–49. But, as Plaintiff correctly observes, if this information is available on a company website, it cannot be personal and private under the FOIA. Likewise, when pressed as to whether it "would be a legitimate public interest to try to determine whether individuals and companies that are applying for benefits with Commerce are also campaign contributors to the governor or other public officials," Ms. Manning conceded, "It could be." *Id.* at 50. The Court finds this concession particularly probative given Ms. Manning's explanation that one way the public can hold Commerce accountable for the efficacy of its work is to vote for a governor who will appoint a Commerce secretary. *See id.* at 41–42. But, as Plaintiff pointed out to Ms. Manning and during oral argument, denying the public access to understand the benefit of the bargain struck by Commerce or even identify the individuals responsible for securing government assistance forecloses the opportunity to hold a governor accountable using the very mechanism Commerce claims is the public's sole recourse: an election. None of this is to say there is anything improper or untoward about the Giti and Viva deals here or other economic incentive

deals. But Commerce cannot, on the one hand, insist that Plaintiff's quarrel is with elected leaders like the Governor, while, on the other hand, refuse public access to the very information that would allow him to petition the Governor for redress or hold him accountable at the ballot box.

Defendants argue disclosure of executive and lawyer names in public records is unwarranted because the name and contact information of the applicant—i.e., the prospect company—is disclosed. *See* Defs' MSJ mem., 10. The Court rejects this distinction. It has long been recognized that corporations act through individuals. *E.g.*, *State v. Solomon*, 245 S.C. 550, 573, 141 S.E.2d 818, 830 (1965); *Potter Voice Techs., LLC v. Apple Inc.*, 24 F. Supp. 3d 882, 886 (N.D. Cal. 2014) (through employees). In this case, prospect companies engage public employees and public officials through their executives and attorneys. Were Plaintiff seeking the disclosure of manufacturing-level employees this might be a closer call, but he has repeatedly disclaimed an interest in, as to Giti for example, the people making tires. What Plaintiff seeks is the identity of the individuals responsible for negotiating economic incentive deals. That is a matter of public interest and Plaintiff has identified legitimate public purposes in seeking that information.

Accordingly, Defendants' reliance on this exemption is overruled and Plaintiff's motion for summary judgment is **GRANTED** as to withholdings based on the personal, privacy exemption at South Carolina Code § 30-4-40(a)(2).

B. There are no proposed contractual arrangements or closed contracts with proprietary information exempt under § 30-4-40(a)(5)(c).

South Carolina Code § 30-4-40(a)(5)(c) permits a public body to exempt from public disclosure "[d]ocuments of and documents incidental to proposed contractual arrangements and documents of and documents incidental to proposed sales or purchases of property; however: … (c) confidential proprietary information provided to a public body for economic development or contract negotiations purposes is not required to be disclosed." S.C. Code Ann. § 30-4-40(a)(5)(c).

Defendants maintain this subsection exempts large categories of public records from disclosure because a public body can withhold confidential proprietary information and doing so here is necessary to prevent putting the recipients of economic incentives at a competitive disadvantage. *See* Defs' MSJ mem., 11. The Court disagrees for two reasons.

First, Commerce offers only conclusory evidence for the proposition that the tire manufacturing industry "is highly competitive in this State." *See* Defs' MSJ mem., 11 (citing Secretary Hitt and Ms. Manning's testimony). Even assuming that is the case, there is nothing in this record that demonstrates that the disclosure of specific public records sought by Plaintiff would place these companies at a competitive disadvantage.

Second, Defendants' formulation of § 30-4-40(a)(5)(c) misapprehends the nature of the exception and reads it as a broad "catchall" category. A better reading of the subsection holds that the exception primarily applies when a contract is proposed or pending, and then includes an exception to the exception that extends exempt status *after* the contract closes but only as to information that remains "confidential and proprietary." Thus, properly read, the purpose of the exemption is to ensure public bodies can negotiate contracts and property conveyances without undermining those efforts or putting the public body on an uneven playing field by requiring an ongoing matter be disclosed to the public. Under the plain language of the section, the exemption does not apply where, as is the case here, the contracts at issue are closed.

However, subsection (a)(5)(c) exception to the exception—i.e., the confidential and proprietary exception—is best read to exclude "confidential proprietary information" from disclosure once the contract or property transaction is closed and otherwise subject to disclosure. Thus, it affords some protections for information shown to be both confidential and proprietary, but these are not defined terms under the FOIA and should not be read to stretch them beyond all

meaning. No party cites any precedent construing these terms and all parties urge the Court to engage in plain-meaning analysis. However, Defendants read these terms to turn on Commerce's application of them on a case-by-case basis. *See* Defs' MSJ mem., 12 ("… Commerce utilizes its experience with private industry and prior responses to FOIA requests to determine on a case-by-case basis whether the information requested includes information that is exempt …"). Plaintiff maintains that approach is untenable and stretches the statutory language beyond any recognizable meaning. *See* Pl.'s MSJ, 25–27 ("Instead, Commerce appears to be misreading the exemption as a broad catchall."). The Court agrees with Plaintiff.

"Confidential information" is defined as "[k]nowledge or facts not in the public domain but known to some, esp. to those having a fiduciary duty not to misuse the knowledge or facts for their own advantage." CONFIDENTIAL INFORMATION, Black's Law Dictionary (11th ed. 2019). "Proprietary information" is defined as "[i]nformation in which the owner has a protectable interest. See trade secret." PROPRIETARY INFORMATION, Black's Law Dictionary (11th ed. 2019). Accordingly, a "trade secret" is defined in part as:

> A formula, process, device, or other business information that is kept confidential to maintain an advantage over competitors; information … that (1) derives independent economic value, actual or potential, from not being generally known or readily ascertainable by others who can obtain economic value from its disclosure or use, and (2) is the subject of reasonable efforts, under the circumstances, to maintain its secrecy.

TRADE SECRET, Black's Law Dictionary (11th ed. 2019). Thus, read together, confidential proprietary information for the purpose of § 30-4-40(a)(5)(c) has the following characteristics: (1) it is outside the public domain, (2) it has independent economic value because of the role it plays in some industry or trade, and (3) the owner has an interest in maintaining its secrecy.

Plaintiff argues, and the Court agrees, that this reading of § 30-4-40(a)(5)(c) would properly render information like the Giti tire formula or the number of tires produced each day as

"confidential and proprietary" and thus exempt, but that most of the entries on Defendants' privilege log lack any clear indicia to support the conclusion they fall within the exception. *See* Pl.'s MSJ, 26. Indeed, the fact that Secretary Hitt testified a land sale that occurred as part of the Giti project remained confidential and proprietary five years later even though the transaction was memorialized in the register of deeds (*see* Prelim. Hr'g Tr. 61–64) suggests Defendants' reading of this exemption has allowed the exception to swallow the rule. The Court rejects this view.

Thus, with the exception of protected taxpayer information and the number of tires produced each day, Defendants' reliance on this exemption is overruled and Plaintiff's motion for summary judgment is **GRANTED** as to withholdings based on the confidential and proprietary exemption at South Carolina Code § 30-4-40(a)(5)(c).

C. Defendants have not met their burden under the working papers exemption at § 30-4-40(a)(9).

The working papers exemption shields from disclosure memoranda, correspondence, documents, and working papers relative to efforts by a public body "to attract business or industry to invest within South Carolina[.]" S.C. Code Ann. § 30-4-40(a)(9). The parties acknowledge, and the Court agrees, the exemption is "broad" and designed to protect "information shared by a private company or developed by Commerce during negotiations and prior to that company committing to invest and create jobs in South Carolina." *See* Defs' MSJ mem., 16. However, Plaintiff urges the Court to construe the exemption narrowly by requiring a temporal nexus demonstrating the withheld record was used "to attract" or used "prior to" the company committing and then hold Defendants have failed to meet their burden of establishing the exemption applies. *See* Pl.'s MSJ, 29–30. The Court agrees with the parties' reading of the exemption and, based on the record here, the Court holds Defendants have failed to prove a sufficient temporal nexus to support their withholdings under the working papers exemption.

The Court's holding turns on the statute's plain meaning as it is only designed to protect papers and communications while the public body is pursuing a deal (i.e., attracting the business), not after. In 1998, then Attorney General Charlie Condon read the statute to require precisely that while warning that, in keeping with the spirit and purpose of the FOIA, "[a]ny and all doubts regarding the applicability of the exemption should be resolved in favor of public disclosure, particularly if the records in question involve the expenditure of public monies or taxpayer dollars." 1998 WL 113845, at *3 (S.C.A.G. Feb. 25, 1998). "Where a public body makes a claim that the exemption contained in § 30-4-40(a)(9) is applicable to a particular document, it possesses the burden of demonstrating that the exemption is indeed applicable." *Id.* Placing the burden of establishing the right to invoke an exemption on the public body asserting it also comports with controlling precedent. *See Glassmeyer*, 414 S.C. at 219, 777 S.E.2d at 839.

Commerce's claims here do not establish the necessary temporal markers to support the conclusion that all § 30-4-40(a)(9) withholdings preceded deal finalization. In holding Defendants have not met their burden, the Court is mindful of Commerce's expansive view of FOIA exceptions generally and the department's liberal application of them in this case to justify its public record withholdings. The FOIA does not permit a public body to paint with so broad a brush. Even where there is a legitimate exemption, "the burden is on the agency to justify its claim that there is no segregable material in a document that is largely exempt, and this burden should not be transferred to the court in making a generalized claim of exemption ... ." 1998 WL 113845, at *3 (quoting 37A Am.Jur.2d Freedom of Information Acts, § 79). Here, the Court has insufficient evidence to conclude Defendants have met their burden.

Accordingly, the Court holds Defendants have not met their burden to rely on the working papers exemption, the exemption is overruled, and Plaintiff's motion for summary judgment is **GRANTED** as to withholdings based on South Carolina Code § 30-4-40(a)(9).

IV. CONCLUSION

For the reasons set forth above, Plaintiff's motion and Defendants' motion are both **GRANTED IN PART AND DENIED IN PART**. Secretary Hitt and Director Young are **DISMISSED WITH PREJUDICE**. The remaining Defendants are **ORDERED** to disclose unredacted and withheld public records consistent with this Order.

AND IT IS SO ORDERED.

_____
The Honorable Robert E. Hood
Circuit Court Judge, Fifth Judicial Circuit

_____, 2020
Columbia, South Carolina.

Richland Common Pleas

Case Caption:	Richard A Harpootlian vs South Carolina Department Of Commerce , defendant, et al
Case Number:	2019CP4005675
Type:	Order/Summary Judgment

So Ordered

s/ R.E. Hood #2164